

No. 22-9908

In the Supreme Court of the United States

FAKEBLOCK, INC. and MAEBY FÜNKE,
Petitioners,

v.

LUCILLE AUSTERO,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifteenth Circuit

BRIEF FOR PETITIONERS

TEAM 34
Counsel for Petitioners

QUESTIONS PRESENTED

- (1) Whether an interactive computer service should receive immunity to liability under the Communications Decency Act of 1996 for a state law right-of-publicity claim.
- (2) Whether a video depicting an artificial-intelligence model that resembles a real-life celebrity infringes upon that celebrity's common law right of publicity or, conversely, is protected under the First Amendment.

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OPINIONS BELOW

The en banc opinion of the Fifteenth Circuit is reported at *Austero v. FakeBlock, Inc.*, No. 20-9804 (15th Cir. Oct. 17, 2022), and is reprinted in full on pages 1a–67a of the Record (“R.”).

STATEMENT OF JURISDICTION

The United States District Court for the District of Newport Beach had diversity jurisdiction over this tort action under 28 U.S.C. § 1332. The United States Court of Appeals for the Fifteenth Circuit had jurisdiction under 28 U.S.C. § 1291 to review the District Court’s final judgment. The Court of Appeals for the Fifteenth Circuit affirmed the district court’s judgment in part and reversed it in part, entering judgment on October 17, 2022. R. at 2a. FakeBlock, Inc. and Maebly Fünke timely petitioned for writ of certiorari, which this Court granted on October 9, 2023. R. at 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant portions of the Communications Decency Act of 1996, 47 U.S.C. § 230, are reproduced at Appendix, *infra*, A-1.

STANDARD OF REVIEW

A district court’s grant of summary judgment is typically reviewed *de novo*. *Thompson v. District of Columbia*, 832 F.3d 339, 344 (D.C. Cir. 2016); *Dahlia v. Rodriguez*, 735 F.3d 1060, 1066 (9th Cir. 2013). According to the Federal Rules of Civil Procedure, courts should “grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to

judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). As with a trial, the movant holds the burden of establishing all of the essential elements of any affirmative defenses for the purposes of summary judgment. *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021).

STATEMENT OF THE CASE

Petitioner Maebly Fünke (“Fünke”) is a digital artist and programmer. R. at 3a. Fünke formerly worked at Petitioner FakeBlock, Inc. (“FakeBlock”), in an undefined and unpaid role until she was terminated in August 2018. R. at 5a–6a. In early 2018, Fünke developed a talking, singing, and dancing model generated using artificial intelligence (“AI”), which represented the latest iteration of her proprietary software. R. at 5a. Fünke had two aims in developing this technology: to demonstrate the capabilities of her technology to potential licensees, and to assist her mother’s political campaign for the United States Congress that year. R. at 5a.

At the time, Fünke’s mother, Lindsay Bluth, was competing with Respondent Lucille Austero (“Austero”) to become a congressional representative from the newly-created state of Newport Beach. R. at 3a. Before running for office, Austero was an actor and singer who retired years prior to her congressional campaign. R. at 1a. Her last acting role occurred in 2009, and she released her last album in 2010. R. at 3a.

Lindsay Bluth campaigned heavily on a variety of social media platforms, including Twitter, Instagram, and FakeBlock. R. at 2a. To support her mother’s campaign strategy, Fünke created a five-minute short film in which her AI-generated avatar, named “Moonie”, appears on stage in a burlesque outfit and begins tap

dancing. R. at 4a. In this film, Moonie stumbles while dancing, appears to lose her balance, and staggers to the side of the stage. R. at 5a. Moonie then sings an altered version of the song “New York, New York” from the Leonard Bernstein musical “On the Town.” The changed lyrics highlight the singer’s wealth and substance use, criticize politicians for supporting pro-immigration policies, and portray the singer as out of touch with the citizens and voters in Newport Beach. R. at 5a, 36a. For example, the model sings: “Newport, Newport, it’s a wonderful town / Voters love me even though I put ‘em down” and “I like to tell ‘em I’ll fix all their probs / But all I’m gonna’ do is give away their jobs.” R. at 36a.

On May 29, 2018, Fünke uploaded “Moonie Bares All” to FakeBlock. R. at 4a. Fünke titled her video (and captioned her corresponding FakeBlock post) “Moonie Bares All!!!” R. at 6a. Fünke wrote “VOTE 4 LINDSAY BLUTH” on the post and provided an internet link to her mother’s campaign website. R. at 6a. The post also described Fünke’s proprietary software. R. at 58a. Fünke had the capability to post the video on FakeBlock directly. R. at 57a. There is no evidence that Fünke discussed posting the video with any FakeBlock corporate officer or that she posted the video in her corporate capacity with the company. R. at 57a. On August 27, 2018, the Chief Executive Officer of FakeBlock, George Maharis, terminated Fünke from her unpaid position with the company. R. at 57a.

On August 24, 2018, Austero filed a lawsuit in federal court against FakeBlock, seeking an injunction to remove the video based on allegations of right of publicity infringement. R. at 6a. Maharis personally removed the video on August 27, 2018,

rendering the injunction unnecessary. R. at 6a. After conducting discovery, FakeBlock and Fünke moved for summary judgment, arguing that Austero failed to state a claim of infringement on her right of publicity and that *Moonie Bears All* is protected under the First Amendment. R. at 7a. FakeBlock additionally moved for summary judgment asserting immunity under section 230 of the Communications Decency Act. R. at 7a.

SUMMARY OF THE ARGUMENT

This Court should grant summary judgment to Petitioner FakeBlock because the interactive computer service provider has immunity from Austero's right-of-publicity claim under section 230 of the Communications Decency Act of 1996. FakeBlock maintains immunity from this cause of action because the claim does not fall under any exception to immunity under the statute, and because the claim treats FakeBlock as a publisher or speaker of a third party's content, as is prohibited under section 230.

Austero's claim does not fall under the intellectual property exception to 230 immunity for two reasons. First, the text, structure, and purpose of section 230 all demonstrate that the intellectual property exception only covers *federal* intellectual property claims, not *state* law claims. In the alternative, Austero's right-of-publicity claim is not an intellectual property claim at all, because it does not deal with a product of human intellect and is not analogous to traditional intellectual property claims, such as copyright or trademark. Finally, the state law preemption clause of

section 230 overrides Austero's claim because the cause of action is inconsistent with the Act.

Without a statutory exception on point, FakeBlock enjoys immunity from Austero's claim under section 230(c)(1), since Austero aims to hold FakeBlock, as a provider of an interactive computer service, liable for the speech or content posted by a third party.

Furthermore, this Court should grant summary judgment to Fünke and FakeBlock on the merits of Austero's right-of-publicity claim. The Fifteenth Circuit erred in its *Erie* guess about the contours of Newport Beach state common law. Instead, the Fifteenth Circuit should have aligned the right of publicity with the plain language of the controlling Restatement, which limits liability to appropriations of names or likenesses only. Even under the standard that the Fifteenth Circuit used to evaluate Austero's claim, Austero has still failed to raise a fact issue sufficient to avoid summary judgment. Austero did not show that the video appropriated an aspect of her identity or persona. Alternatively, Austero did not prove that her name or likeness retained commercial value or that the video was likely to cause damage to this commercial value.

However, even if Austero had sustained a right of privacy claim, Fünke and FakeBlock are also entitled to summary judgment on the basis of their affirmative defenses under the First Amendment. As political commentary, this video qualifies as speech in the public interest and thus is immune from liability. This Court should treat content-based restrictions of speech with strict scrutiny and find that the

common law right of publicity as applied in this dispute is neither narrowly tailored nor serving a compelling governmental interest. Under the transformative-use test, the video also qualifies as protected parody, as it is sufficiently transformed beyond a mere likeness or imitation.

ARGUMENT

I. AS AN INTERACTIVE COMPUTER SERVICE, FAKEBLOCK IS ENTITLED TO SECTION 230 IMMUNITY UNDER THE COMMUNICATIONS DECENCY ACT OF 1996.

Section 230 of the Communications Decency Act (“CDA”) confers immunity on interactive computer services from certain claims, 47 U.S.C. § 230(c), in order to encourage the development of a free market on the internet, as well as the efficient spread of publicly available information and internet services. *Id.* § 230(b). Under the statute, some claims are excepted from section 230 immunity, such as certain intellectual property claims, *id.* § 230(e)(2), and some state law claims, *id.* § 230(e)(3). In this case, FakeBlock enjoys section 230 immunity because none of the exceptions to immunity apply to Austero’s claims.

A. Austero’s Claim Against FakeBlock Does Not Qualify for an Exception to Section 230 Immunity.

Austero’s right-of-publicity claim does not qualify for an exception to section 230 immunity under the CDA for three reasons. First, the intellectual property exception to immunity, 47 U.S.C. § 230(e)(2), does not cover claims made under state law. Second, even if this Court determines that the intellectual property exception applies to state law claims, Austero’s claim is not sufficiently tied to intellectual property, and is instead a privacy-based tort claim. Finally, the state law exception to

immunity, *id.* § 230(e)(3), does not apply to Austero’s claim because her claim is inconsistent with the CDA.

1. Section 230(e)(2), the intellectual property exception to immunity, does not cover Austero’s claim.

FakeBlock enjoys section 230 immunity under the CDA because the intellectual property exception only applies to claims brought under federal law. Here, because Austero brought a state law claim, the CDA protects FakeBlock from liability. Additionally, regardless of whether the CDA applies to state law claims, Austero’s right-of-publicity claim is not actually an intellectual property claim, but instead a privacy-based tort claim, not sufficiently tied to intellectual property to qualify for an exemption to section 230 immunity.

i. The intellectual property claim exception to section 230 immunity does not apply to state law claims.

This Court should adopt the Ninth Circuit’s interpretation of section 230(e)(2) and clarify that the intellectual property exception to immunity for interactive service providers does not apply to state law claims. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007) (“[W]e construe the term ‘intellectual property’ to mean ‘federal intellectual property.’”). This reading is consistent with the language and structure of the CDA, and, critically, is coherent with the purpose of the Act. The CDA does not include a clear definition of “intellectual property,” leaving courts with limited guidance on what the phrase should encompass. At the same time, federal courts across the country have read the CDA to provide broad immunity to internet service providers. *See, e.g., Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (“[C]lose cases, we believe,

must be resolved in favor of immunity[.]”); *Atl. Rec. Corp. v. Project Playlist*, 603 F. Supp. 2d 690, 699 (S.D.N.Y. 2009) (“[T]he CDA’s grant of immunity should be construed broadly.”). This Court’s reading of section 230(e)(2), the intellectual property exception, should maintain broad immunity for service providers by finding that the statutory exception applies only to federal law.

Section 230(e)(2) provides: “Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2). Statutory language, “plain or not, depends on context.” *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991). The Court should interpret section 230(e)(2) as a provision compatible with the rest of subsection 230(e), and with section 230 as a whole. When considered with the rest of the statutory provisions of section 230(e), subsection 230(e)(2) is clearly meant to cover federal intellectual property claims specifically.

The language and structure of section 230(e)(2) point towards construing “any law pertaining to intellectual property” as meaning any *federal* law pertaining to intellectual property. Section 230(e) refers to federal law by default, and includes state law only when directly mentioned—more specifically, only when the state law is consistent with the relevant federal law. Section 230(e)’s headings are drafted in general terms: for example, “no effect on criminal law,” 47 U.S.C. § 230(e)(1), “no effect on intellectual property law,” *id.* § 230(e)(2), and “no effect on communications privacy law,” *id.* § 230(e)(4). Subsections 230(e)(1), 230(e)(4), and 230(e)(5) refer to *federal* law specifically, excluding from immunity only state laws that cover the same conduct as specified in the federal statutes. *See, e.g., id.* § 230(e)(1) (“Nothing in this

section shall be construed to impair the enforcement of . . . any other Federal criminal statute.”); *id.* § 230(e)(4) (“Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.”). Although subsection 230(e)(2) does not reference *federal* law explicitly, considering the similarity between the headings of these sections, and the fact that the other sections aim to address federal law, it is likely that Congress intended for section 230(e)(2) to deal with federal law as well. Additionally, had Congress meant to except state law from immunity, they could have explicitly included it in subsection 230(e)(2), just as they did in, for example, 230(e)(4). *Id.* § 230(e)(4) (adding “or any similar State law” at the end of the clause discussing federal law).

A common canon of statutory construction, *noscitur a sociis*, guides courts to read words and clauses in the context of their surrounding words and subsections, and that potentially ambiguous terms may take on a meaning similar to that of nearby terms. *See Yates v. United States*, 574 U.S. 528, 543 (2015) (quoting *Gustafson v. Alloyd Co., Inc.*, 512 U.S. 561, 575 (1995)) (“[W]e rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to ‘avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.’”). In application to the CDA, this canon encourages reading the word “federal” into the intellectual property exception, since it appears in several of the exception’s “sister-clauses.” This reading avoids giving an overly broad meaning to the Act. In addition to its explicit mention of federal law in

the other clauses regarding specific bodies of law, *see, e.g.*, 47 U.S.C. § 230(e)(1) (criminal law), Congress addresses state law separately, and much more generally, in section 230(e)(3), exempting only state laws that are coherent with the rest of the Act from falling under general immunity. *Id.* § 230(e)(3) (“Nothing in this section [230] shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”).

Taken together, the structure of section 230(e) suggests reading intellectual property claims as *federal* intellectual property claims. The exclusions to immunity included in section 230(e) pertain to varying topics under federal law, and reference state laws only where they reach the same conduct as the relevant federal laws. These clauses are paired with a separate exception that addresses state law. There is no reason to assume the intellectual property exception would function separately from the rest of the subsections of section 230(e): namely, as an exception dealing with a specific area of law, section 230(e)(2) should apply to *federal* law in that area.

Additionally, it is most natural to assume Congress intended the term “intellectual property” to refer to *federal* intellectual property because that is the legal regime that Congress is authorized to create under the “Intellectual Property Clause” of the Constitution. U.S. Const. art. I, § 8, cl. 8. State intellectual property laws “bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals.” *Perfect 10*, 488 F.3d at 1118. Including them under section 230(e)(2) would create an overly broad reading of the statute, not in

line with how intellectual property claims are generally understood. Given the ambiguity in the statute, it is reasonable to construe the term “intellectual property” to encompass the elements traditionally associated with it: federal copyrights and patent rights, not state right-of-publicity claims.

Austero may argue that the text of the statute instead suggests the inclusion of state intellectual property claims in the section 230(e)(2) exception to immunity, relying on *Universal Comm’n Sys., Inc. v. Lycos*, 478 F.3d 413, 422–23 (1st Cir. 2007), and *Hepp v. Facebook*, 14 F.4th 204, 201–11 (3d Cir. 2021). The First Circuit in *Lycos* accepted that claims based in state law constitute an exception to immunity without explaining its reasoning, making it not particularly instructive. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 26 n.9 (1st Cir. 2016) (noting that the application of the intellectual property exemption to state law claims by its own 2007 decision is “not free from doubt”); *see also* R. at 14a. (“We do not find *Lycos* particularly instructive here[.]”). In *Hepp*, the Third Circuit argued that because the statute includes the word “any,” in modifying the phrase “law pertaining to intellectual property,” the section 203(e)(2) exception should apply to *any* intellectual property laws, including state laws. *Hepp*, 14 F.4th at 210–11. The Third Circuit also noted that “when Congress wanted to cabin the interpretation about state law, it knew how to do so—and did so explicitly.” *Id.* at 211.

Even if the Third Circuit’s reading of the statute is *plausible*, it is certainly not *unambiguous*. *See Perfect 10*, 488 F.3d. at 1118 (“The CDA does not contain an express definition of ‘intellectual property[.]’”); *see also Jane Doe No. 1*, 817 F.3d at

26 n.9 (calling the application of section 230(e)(2) to state law claims a “muddled matter”). Though the text and structure read in FakeBlock’s favor, there is admittedly a lack of clarity in the text and structure of the statute. Therefore, this Court should turn to congressional intent to shed light on the statute’s meaning, as it has done in countless cases. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (“It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute[.]”); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 589–90 (2004) (using a narrow reading of the word “age” to resolve ambiguity in the statute by relying on Congressional intent to achieve a certain policy goal to illuminate statutory meaning). Turning to the purpose of the statute is especially relevant when an initial interpretation of the statute “produces an unexpected result and when there is strong reason to doubt that Congress intended that result.” *Lewis v. Grinker*, 965 F.2d 1206, 1215 (2d Cir. 1992).

Any interpretation of the CDA that exempts state intellectual property laws from section 230 immunity would clearly frustrate congressional intent and produce a result entirely inconsistent with Congress’ stated policy goals. In section 230, Congress explicitly delineates—in the text of the statute—its policy goals in passing the 1996 amendment to the CDA: these include promoting and preserving a vibrant free market on the internet, “unfettered by Federal or State regulation,” 47 U.S.C. § 230(b)(2), and encouraging the development of technology that maximizes user control over content, *id.* § 230(b)(3). Allowing the intellectual property exception to

immunity to reach state law claims would be entirely contrary to Congress' goal of "insulating the development of the Internet from the various state-law regimes." *Perfect 10*, 488 F.3d at 1118. State law claims are extremely varied, and material posted on a website can be viewed across the internet from several states at once. *Id.* Additionally, "[i]nteractive computer services have millions of users." *Stayart v. Yahoo!*, 651 F. Supp. 2d 873, 884 (E.D. Wis. 2009) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)). Allowing tort liability for state law claims in this area would "have an obvious chilling effect." *Id.* (noting that Congress "chose to immunize service providers to avoid any such restrictive effect"). If Congress meant to leave internet service providers room to innovate "unfettered" by regulation, subjecting them to liability under a myriad of different state causes of action would completely undermine this purpose. *See United States v. Kirby*, 74 U.S. 482, 486 (1868) ("All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to . . . an absurd consequence.").

This Court should construe section 230(e)(2) in a manner that is consistent with Congress' stated policy goals and avoid giving the statute an incongruous interpretation. *See Hepp*, 14 F.4th at 220 (Cowan, J., dissenting) ("Would Congress have really gone so far as to grant immunity from a wide range of state and federal laws—including state criminal law—yet permit claims to go forward under the nebulous (and expansive) category of state 'intellectual property'/'rights of publicity' laws?"). Here, that clearly means following the Ninth Circuit's interpretation of the

statute and finding that the immunity exception found in subsection 230(e)(2) of the CDA applies to *federal* intellectual property law only. *Perfect 10*, 488 F.3d at 1119.

- ii. **In the alternative, FakeBlock maintains immunity because Austero’s right-of-publicity claim is not an intellectual property claim, but rather a privacy-based tort claim.**

Even if section 230(e)(2), the intellectual property exception, covers state law claims, FakeBlock still enjoys immunity under the CDA because Austero’s right-of-publicity claim is not an “intellectual property” claim. Austero sued FakeBlock for a breach of her right of publicity. R. at 2a. Newport Beach recognizes a common-law cause of action for infringing on another’s right of publicity: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.” R. at 9a (citing the RESTATEMENT (SECOND) OF TORTS § 652C). Several states have a similar statutory or common law right-of-publicity causes of action, and courts differ as to whether they consider these claims to fit under the intellectual property exception of the Communications Decency Act. *Compare Ratermann v. Pierre Fabre USA, Inc.*, 651 F. Supp. 3d 657, 668–69 (S.D.N.Y. 2023) (holding that a right-of-publicity or privacy claim does not fall within the intellectual property exception to section 230), *and Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302–03 (D.N.H. 2008) (noting that the section 230(e)(2) exception does not apply to “‘a personal right, peculiar to the individual whose privacy is invaded’ which cannot be transferred like other property interests.”), *with Hepp*, 14 F.4th at 213 (finding that “‘intellectual property’ has a recognized meaning which includes the right of publicity.”).

Broadly, courts look not only at whether the claim generally touches on intellectual property *issues*, but specifically at whether the plaintiff's claim itself involves an intellectual property *right*. See, e.g., *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d. 1040, 1052 (9th Cir. 2019) (“[T]he intellectual property exception contained in § 230(e)(2) encompasses claims pertaining to an established intellectual property right under federal law, like those inherent in a patent, copyright, or trademark.”). Notably, *Black’s Law Dictionary* defines “intellectual property” as a “category of intangible rights protecting commercially valuable products of the human intellect.” *Intellectual Property*, BLACK’S LAW DICT. (11th ed. 2019). *Black’s* further provides examples of intellectual property: “a copyrightable work, a protectable trademark, a patentable invention, or a trade secret.” *Id.* Critically, intellectual property claims are meant to pertain to *property*. While Austero may argue that her claim meets this criteria because she aims to demonstrate a financial injury based on a dilution of her right to profit from her publicity, R. at 18a, injury to finances does not end the inquiry. See pages 34–38, *infra* (arguing that Austero failed to demonstrate sufficient commercial damage for a successful right-of-publicity claim). Instead, the question of whether a claim relates to intellectual property hinges, more expressly, on whether the claim involves infringements upon commercially valuable *products of human intellect*. See, e.g., *Jane Doe No. 1 v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 163 n.13 (D. Mass. 2015) (noting that a person’s image is not the product of human intellect); see also *Intellectual Property*, BLACK’S LAW DICT.

Here, Austero’s claim does not seek recovery for injury to her intellectual property. The right-of-publicity claim in question concerns the wrongful appropriation of Austero’s “name or likeness,” not on a product of her human intellect. Austero bases her claim on the physical resemblance between herself and Moonie, as well as the similarities between her own previous performances and Moonie’s dancing. R at 23a–25a (listing similarities and differences between Moonie and Austero). Austero’s physical appearance does not constitute a protectable interest stemming from her compensable efforts. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (noting that right-of-publicity claims are meant to protect the proprietary interest of individuals in reaping the full reward of their endeavors). Austero’s right-of-publicity claim also relies on Moonie’s performance allegedly referencing Austero’s vertigo and history of substance use, R. at 55a, both of which are not products of human intellect constituting intellectual property.

In addition, a right-of-publicity claim differs significantly from other examples of traditional “intellectual property” claims, like, for example, copyright or trademark claims. *See Enigma*, 946 F.3d at 1053 (clarifying that patent, copyright, and trademark claims are “established intellectual property right[s] under federal law”). The basis of a right-of-publicity claim is distinct from that of a copyright claim: “A persona can hardly be said to constitute a ‘writing’ of an ‘author’ within the meaning of the Copyright Clause of the Constitution . . . [someone’s] name and likeness do not become a work of authorship simply because they are embodied in a copyrightable work such as a photograph.” Melville B. Nimmer & David Nimmer, *Nimmer on*

Copyright § 1.01[B][1][c] (3d ed. 2017). Similarly, though at times a photograph may constitute a valid trademark, it is “not inherently ‘distinctive’ in the trademark sense of tending to indicate origin.” *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 583 (2d Cir. 1990). This is because “a person's likeness is not a consistently represented fixed image.” *Id.* In analyzing a right-of-publicity claim, particularly as it is framed in Newport Beach common law, this Court must consider whether one’s use of another’s likeness constitutes an invasion of their privacy. This is dissimilar from the considerations at play in copyright or trademark claims, which are focused on property, specifically the product of a person’s efforts and intellect, rather than on an invasion of privacy. *Friendfinder*, 540 F. Supp. 2d at 302–03.

Austero may rely on the Court’s decision in *Zacchini v. Scripps-Howard Broad. Co.* to argue that the right of publicity is an intellectual property claim. The facts in *Zacchini* are not analogous to those in this case. There, the Court considered whether a broadcasting service could record the plaintiff’s performance and air it on the nightly news without violating an Ohio right-of-publicity tort. *Zacchini*, 433 U.S. at 563–64. Still, in that case, the Court noted that the state’s interest in allowing right-of-publicity claims is analogous to the goals of patent and copyright law, *id.* at 573, which Austero may argue suggests a correspondence between the two types of claims. A similarity between state interests in enforcing various claims, however, does not make them equivalent. *Ratermann*, 651 F. Supp. 3d. at 670 (“*Zacchini* . . . [actually] undermines Ratermann's argument because it reaffirms that [right-of-publicity] claims . . . are ‘entirely distinct from’ common law right of publicity claims and not

about property at all.”). The language in *Zacchini* does not “proclaim that all rights of publicity are *ipso facto* intellectual property[.]” R. at 52a (Walt, J., dissenting). States may have an interest in protecting individuals’ right to profit from their publicity, but that does not mean that all right-of-publicity claims are also intellectual property claims.

Instead of broadly determining whether right-of-publicity claims qualify as intellectual property claims, this Court can follow the dissent’s methodology in the Fifteenth Circuit’s treatment of Austero’s case. R. at 54a. In his dissent, Judge Walt considered various statutory and common law claims on a case-by-case basis by, for example, comparing the elements of the relevant claims with the definition of intellectual property, as set out in *Black’s*, or in other federal statutes. R. at 54a; *see, e.g.*, 11 U.S.C. § 101(35A) (defining intellectual property as including trade secrets and patent applications, among other claims, but not including right of publicity); 19 U.S.C. § 2242(d)(2) (defining intellectual property as rights related to patents, trademarks, and copyright, among other claims, but not including right of publicity).

This approach highlights the importance of the details of each right-of-publicity claim in question. For example, in *Friendfinder*, the plaintiff sued defendants on a number of counts, including a statutory claim of invasion of privacy/intellectual property rights, arising out of defendants’ placement of allegedly false personal advertisements about her on their websites. *Friendfinder*, 540 F. Supp. 2d at 293. In that case, the District of New Hampshire decided that the right-of-publicity claim qualified as an intellectual property claim. At the same time, the Court noted that

causes of action that “protect ‘a personal right, peculiar to the individual whose privacy is invaded’ . . . [and] cannot be transferred like other property interests” are not intellectual property claims within the meaning of the CDA. *Id.* at 302–03.

Notably, the claim the Court considered under New Hampshire state law is not identical to Austero’s claim in this case. The question in *Friendfinder* was whether “[defendants had] appropriated [plaintiff’s] *identity* for their own benefit or advantage.” *Id.* at 302 (emphasis added). The question under Austero’s Newport Beach law claim asks whether defendants appropriated the plaintiff’s “name or likeness.” R. at 9a. While perhaps similar, these two claims are not entirely comparable, particularly in an analysis of whether they pertain to intellectual property. One’s “identity” is more likely to be the product of one’s endeavors or human intellect, while a person’s “name or likeness” is more personal, and less related to reaping the rewards of one’s intellectual efforts. In addition, though in *Hepp* the statute in question also considered “name or likeness,” like the tort in today’s case, the cause of action in *Hepp* focused on a defendant’s use of the likeness for “commercial or advertising purposes,” which emphasized the legislature’s property-based concerns. 14 F.4th at 213 (citing 42 Pa. Cons. Stat. § 8316(a)). Newport Beach’s claim does not contain similar language related to a defendant’s financial gain, making *Hepp* a less than ideal comparison.

The Southern District of New York’s treatment of the right of publicity is more instructive for this case. In *Ratermann*, a model brought right-of-publicity claims under New York law against several companies for using her likeness without her

consent. 651 F. Supp. 3d at 663–64. The Southern District found that the defendants in that case enjoyed immunity under the CDA because right-of-publicity claims are not intellectual property claims under subsection 230(e)(2), but rather common law right of privacy claims. *Id.* at 668. Ratermann sued under a New York right-of-publicity statute which prohibits the “use ‘for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person.’” *Id.* at 665. The New York statute is more analogous to the Newport Beach statute in this case. The statute in *Ratermann* is slightly more specific than the Newport Beach common law claim: instead of including the broad term of “likeness,” the New York statute spells out “portrait or picture.” Still, the New York statute involved precisely the kind of likeness in question in this case. Austero sued FakeBlock for the inappropriate use of her features, such as they are captured in images and videos, in a model generated by artificial intelligence. Thus, this Court should follow the Southern District’s treatment of the right-of-publicity claim, namely finding it to be a privacy claim, rather than one pertaining to intellectual property.

In addition, as discussed above, *see* pages 11–14, *supra*, finding that right-of-publicity claims are intellectual property claims under the CDA would frustrate congressional intent in passing the statute. If all right-of-publicity claims, no matter how personal or related to property, are exempt from section 230 immunity, interactive computer providers could be subject to countless state law claims because of content posted by other actors on their platforms, stunting innovation and

hindering a free market on the internet. *See* 47 U.S.C. § 230(b)(2) (emphasizing that Congress passed the statute in order to “preserve the vibrant and competitive free market that presently exists for the Internet”).

2. Section 230(e)(3), the state law exception, does not apply to Austero’s claim.

Subsection (e)(3) of section 230 states: “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3). In *Atl. Rec. Corp.*, the Southern District of New York noted plainly that “Section 230(e)(3) does not attempt to define what state law is consistent and inconsistent with the CDA; in other words, 230(e)(3) provides no substantive content.” 603 F. Supp. 2d at 702. If they address this subsection at all, courts generally focus exclusively on its second sentence, finding that it explicitly preempts any state causes of action that are inconsistent with the CDA. *See, e.g., Zeran*, 129 F.3d at 334 (clarifying that courts must follow Congress’ express statement that the CDA should govern over state law); *Domen v. Vimeo, Inc.*, 991 F.3d 66, 70 n.4 (2d Cir. 2021) (“Section 230(e)(3) also expressly preempts state law causes of action in the event of an “inconsisten[cy]” between such actions and Section 230.”). This emphasis on preemption makes sense, given the need for courts to honor congressional intent in passing the statute. The preemptive nature of the statute is critical to Congress’ attempt to promote a free market on the internet by shielding computer service providers from liability for a myriad of extremely varied state law claims. *Perfect 10*, 488 F.3d at 1118.

Without further guidance from Congress on the issue, courts have considered simply whether the state law in question would violate Section 230(c)(1) by treating service providers as the publisher of another user’s content in determining whether that law, or a particular application of the law, is consistent with section 230. *See, e.g., HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 683 (9th Cir. 2019) (holding that an ordinance regulating home rentals “is not ‘inconsistent’ with the CDA” because it would not impose a duty on websites to monitor third-party content); *see also Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1273 (W.D. Wash. 2012) (holding that a state criminal law “is likely inconsistent with and therefore expressly preempted by Section 230” because it would impose liability on websites for third-party content).

Here, section 230(e)(3) would not counteract FakeBlock’s immunity from liability because Austero’s claim is directly treating FakeBlock as the speaker or publisher of another’s content. *See* pages 22–23, *infra*. Therefore, the state law claim is inconsistent with the CDA and preempted by the second clause of subsection (e)(3).

B. Section 230 Immunity Protects FakeBlock From Liability for Austero’s Right-of-Publicity Claims.

Absent a statutory exception to immunity for a right-of-publicity claim, as demonstrated above, FakeBlock enjoys immunity if: i) FakeBlock is a provider of an interactive computer service; ii) Austero’s claim treats FakeBlock as a publisher or speaker; and iii) Austero’s claim is based on information provided by another “information content provider.” *Lycos*, 478 F.3d at 418; *see also* 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the

publisher or speaker of any information provided by another information content provider.”). The parties agree that FakeBlock is an interactive computer service provider, and that Austero’s claim treats FakeBlock as a publisher or speaker. R. at 9a–11a. The facts in the record establish that the third element is present as well: Austero seeks to hold FakeBlock responsible for another information provider’s, namely Maebly Fünke’s, speech. R. at 4a–5a.

Judicial interpretation of section 230(c)(1) allows an internet service provider to make some editorial adjustments to third-party content without being considered the speaker or publisher of that content. *Zeran*, 129 F.3d at 330 (noting that service providers cannot be held liable for decisions regarding “whether to publish, withdraw, postpone or alter content” under section 230). The defendant’s role in the “creation or development” of the content is critical in analyzing third party content. For example, in *Batzel v. Smith*, the Ninth Circuit found that a website operator making minor alterations to an email before posting it on a listserv did not leave the operator open to liability for defamation. 333 F.3d 1018, 1031 (9th Cir. 2003). In *Roommates.com*, on the other hand, the Ninth Circuit found that the defendant could be held liable under the Fair Housing Act for a questionnaire that users were required to fill out, because the questionnaire constituted the defendant’s own speech. 521 F.3d at 1165.

Here, Austero agrees that Fünke posted the video, but she argues that Fünke did so in her capacity as a corporate officer of FakeBlock. It is clear from Fünke’s actions and intentions, however, that she was acting in her personal capacity. Fünke was not a corporate officer of FakeBlock; in fact, she had no job title within the company. R.

at 56a. Most importantly, Fünke stated that she created and uploaded the Moonie video in order to assist her mother's campaign and advertise her software. R. at 41a. FakeBlock's Chief Executive Officer dismissed Fünke for posting the video, suggesting she was not acting as part of the corporate team in uploading the content. R. at 42a; *see also Zeran*, 129 F.3d at 330 (clarifying that removing content does not make a service provider the content provider for purposes of section 230(c)(1)). It is true that Fünke posted videos on FakeBlock to draw traffic to the website. R. at 42a. There is no evidence, however, that her motivation was connected to her involvement with FakeBlock the company. Nor is there evidence that the video was likely to draw additional investors to the company. Instead, additional traffic to the website may have nominally grown Fünke's personal investment in the website, but it was more likely to significantly garner interest in her software. R. at 58a. Given Fünke's personal interests in uploading the video and an absence of evidence demonstrating that FakeBlock played any role in the creation or development of the video, FakeBlock cannot be considered the content information provider with regard to the video in question.

Austero's claim seeks to hold FakeBlock responsible for information provided by another information provider, Fünke, who was simply a user of the platform. Thus, the right-of-publicity claim in this case satisfies all three elements necessary for FakeBlock to be entitled section 230 immunity, 47 U.S.C. § 230(c)(1), and this Court should grant summary judgment to FakeBlock in order to protect the existence of an internet free from excessive regulation.

II. FAKEBLOCK AND FÜNKE ARE ENTITLED TO SUMMARY JUDGMENT ON AUSTERO'S RIGHT-OF-PUBLICITY CLAIM.

The Fifteenth Circuit erred in reversing the district court's grant of summary judgment on the merits of Austero's right to publicity claim for two reasons. First, Austero has failed to plead sufficient facts to give rise to a colorable right-of-publicity violation under any state common law standard. Second, even if Austero had a viable tort claim, FakeBlock and Fünke's affirmative defenses under the First Amendment shield them from liability.

A. *Moonie Bares All* Did Not Infringe Upon Austero's Right of Publicity.

The right of publicity is a right of recent origin, *see ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003), which has been defined as “the right to control the use of one's own name, picture, or likeness and to prevent another from using it for commercial benefit without one's consent.” *Right of Publicity*, BLACK'S LAW DICTIONARY (11th ed. 2019). The Newport Beach State Court has recognized the common law right of publicity as stated in the Restatement (Second) of Torts: “One who appropriates to his own use or benefit the *name* or *likeness* of another is subject to liability to the other for invasion of his privacy.” RESTATEMENT (SECOND) OF TORTS § 652C (1977) (emphasis added). Austero has failed to establish a prima facie case for a right-of-publicity violation under either the standard the Fifteenth Circuit used, or any other one.

1. The Fifteenth Circuit erred by making an incorrect *Erie* guess about the contours of Newport Beach state tort law.

The *Erie* doctrine requires the Federal court that acquires jurisdiction over a specific case governed in part by state law to apply the substantive law of the states.

Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). The twin aims of the doctrine are to prevent forum shopping among litigants and ensure equitable administration of the laws. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). The Fifteenth Circuit erred by making an *Erie* guess at Newport Beach state law without a sufficient supporting basis. The Supreme Court of Newport Beach has never identified the elements of a right-of-publicity claim, nor has any other Newport Beach state court. R. at 22a. Nevertheless, the Fifteenth Circuit defined the “apparent elements” of the right-of-publicity tort in Newport Beach using a district court opinion from New Hampshire as the sole authority for its assertion. R. at 20a. In *Doe v. Friendfinder Network, Inc.*, the New Hampshire district court referenced the following elements as listed in a single treatise:

- (1) Validity. Plaintiff owns an enforceable right in the identity or persona of a human being; and
- (2) Infringement.
 - (A) Defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant's use; and
 - (B) Defendant's use is likely to cause damage to the commercial value of that person.

540 F. Supp. 2d 288, 304 (D.N.H. 2008) (citing 1 McCarthy, Rights of Publicity, § 3:2 (hereinafter “McCarthy treatise”)).

The interpretation accepted by the Fifteenth Circuit marks a major expansion from the tort as drafted in the Restatements: from “appropriat[ing]. . .the name or likeness of another” to “us[ing] some aspect of identity or persona.” RESTATEMENT (SECOND) OF TORTS § 652C. Notably, however, the *Friendfinder* court did not suggest that the McCarthy treatise reflected the majority view or even the correct application

of New Hampshire state law. Instead, the court assumed—*without deciding*—that the treatise’s enumerated elements governed the case because the defendant had cited it in its reply memorandum. *See Friendfinder*, 540 F. Supp. 2d at 304 n. 18 (“Because the defendants rely solely on the [McCarthy] treatise for the elements of a right of publicity claim . . . the court will assume for purposes of this motion that McCarthy’s view comports with New Hampshire law, reserving a final decision on this issue for later in the proceedings.”). The Fifteenth Circuit’s conclusory analysis of one district court opinion to hypothesize foreign state law necessarily “involve[d] more divining than discerning.” *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 202 (5th Cir. 2020). Furthermore, the Fifteenth Circuit looked to a *federal* court for guidance, and federal courts who look only to other *federal* court rulings are “essentially creating new state law based on a perceived federal common law that the Supreme Court stated in *Erie* does not exist.” R. Jason Richards, *The Enduring Problem of Erie Guesses*, *Trial*, November 2021, at 34, 36. In lieu of preempting Newport Beach courts with an uneducated guess, the Fifteenth Circuit should have taken one of two alternative approaches.

First, the Fifteenth Circuit should have certified a question to the Newport Beach State Supreme Court asking to clarify the elements of their right-of-publicity tort. Federal courts may certify questions of law to state courts in every state but North Carolina, *see* Bennett Cooper, *Certification of Questions of Law to State Supreme Courts*, Reuters (June 22, 2021 3:46 PM) <https://www.reuters.com/legal/legalindustry/certification-questions-law-state->

supreme-courts-2021-06-22/, including Newport Beach. R. at 60a. Failure to certify a question of state law to the respective state court is an appropriate basis to vacate and remand to a federal appellate decision. *See Lehman Bros. v. Schein*, 416 U.S. 386, 392 (1974) (remanding back to the Second Circuit to consider certifying a novel question of Florida state law to the local state court). As the *Lehman Bros.* Court noted, certification of questions is “particularly appropriate in view of the novelty of the question and the great unsettlement of [state] law . . . [in] a distant state.” *Id.* at 391. As in *Lehman Bros.*, here the Fifteenth Circuit is grappling with state law questions of first impression as “outsiders lacking the common exposure to local law which comes from sitting in the jurisdiction.” *Id.*

Second, the Fifteenth Circuit should have adopted the practice of a plethora of other courts and consulted a diversity of sources to make a more educated *Erie* guess. In determining aspects of state law absent specific instruction from state courts, federal courts “may consider all available legal sources, including the Restatements of Law, treatises, law review commentaries, decisions from other jurisdictions whose doctrinal approach is substantially the same, and ‘the majority rule.’” *See Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 398 (5th Cir. 1986) (quoting 19 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4507); *see also Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 623 (6th Cir. 2000) (“[C]ourts typically give attention to the entire available body of case law when deciding right of publicity cases.”) (citing *Cheatham v. Paisano Publications, Inc.*, 891 F. Supp. 381, 385 (W.D. Ky. 1995)). Other jurisdictions have read the right of publicity more narrowly. While

the Ninth Circuit has read an expansive interpretation to include conduct that “evokes an identity,” other courts have constrained this tort to the name or likeness alone. *See Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 1001 (Colo. 2001) (recognizing five distinct elements to the Colorado common law right to publicity, including that the defendant used the plaintiff’s name or likeness). In making its own Erie guess about Newport Beach common law, this Court should refrain from making the same mistake. This Court should restore the right of publicity to the plain text of the Restatements and avoid “creating a new and much broader . . . right.” *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1515 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc).

2. Under any right-of-publicity standard, Austero has failed to make a prima facie case.

As a matter of law, Austero cannot sustain a prima facie right-of-publicity case even under the standard employed by the Fifteenth Circuit. Austero did not establish that *Moonie Bares All* appropriated an aspect of her identity or persona. Even if she were able to show such an appropriation, Austero failed to show that this video damaged her commercial persona.

i. Austero failed to prove *Moonie Bares All* appropriated an aspect of her identity or persona.

Austero’s claim that petitioners appropriated her likeness is untenable for two reasons: 1) the fictional character of Junie Moon is not an aspect of Austero’s identity or persona, and 2) the AI model did not appropriate Austero’s likeness.

Generally, an actor has no protectable publicity right in the character they play. See *Landham*, 227 F.3d at 626 (“[T]he focus of any right of publicity analysis must always be on the actor's own persona and not the character's.”); *Lugosi v. Universal Pictures*, 603 P.2d 425, 432 (Cal. 1979) (Mosk, J., concurring) (explaining that actors have no inherent right to profit from their roles as fictional characters); *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997) (noting the rights to profit off of such characters belonged to the owner of the copyright, not the actor). Courts allowed right-of-publicity claims based upon fictional characters “only when it is shown that the two personalities are inseparable in the public's mind.” *Landham*, 227 F.3d at 625; see also *McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994) (“Where an actor's screen persona becomes so associated with him that it becomes inseparable from the actor's own public image, the actor obtains an interest in the image.”). Austero’s right-of-publicity claim fails to demonstrate a similar nexus between artist and character. The character upon which the “Moonie” name is based, Junie Moon, is one of Austero’s many roles: she has appeared in twenty-two movies. The movie’s lack of commercial success in the past fifty-two years strongly suggests that the viewing public will not closely associate Austero with this specific role. *Contra White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) (noting that the plaintiff is specifically known as the host of Wheel of Fortune, one of the most popular shows on television with 40 million viewers daily). *But see id.* at 1404 (Alarcon, J., concurring in part) (criticizing the majority for failing to separate White the character from White the individual). Here, Austero is easily distinguishable from Vanna White, who is “a one-

role celebrity . . . famous solely for appearing as the hostess on the “Wheel of Fortune” television show.” *Id.* (Alarcon, J., concurring in part). In contrast, Austero alleges Moonie is a composite of many roles, “assembled from bits and pieces of Austero from various times and performances over her long career.” R. at 27a. Even under the approach favored by the *White* majority, in which the character and the actor can merge into a singular identity, Austero the individual cannot be said to be “so synonymous” with Junie Moon the fictional character, or any other character, for a personal right of publicity to flow from it.

Even if this Court finds that Austero has a protectable identity interest in the character of Junie Moon, petitioners’ AI model does not appropriate Austero’s likeness to give rise to a right to publicity claim. There are several key physical differences between the AI model and Austero. The character played by Austero had a different hair style than the hair style Moonie or Austero currently have. R. at 64a.

In addition:

- Austero has a beauty mark on her left cheek, but Moonie does not;
- Moonie’s nose features a prominent downward tip, but Austero’s does not;
- Moonie’s mouth is disproportionately large for her head;
- Austero’s famous smile usually displays her teeth, but Moonie’s smile does not;
- A close inspection reveals there are only four fingers on Moonie’s left hand, and the skin on that hand displays inconsistent aging (*i.e.*, the skin on the back of the hand and three of the fingers is wrinkled, but the index finger is smooth); and
- Perhaps most noticeably, Moonie’s eyes are rather wideset, and her right eye has an unnatural and asymmetric slant that is not only distinct from Austero’s (symmetric) eyes but also dissimilar even from Moonie’s left eye.

R. at 23a–24a.

Nevertheless, in analogizing Moonie to a “Frankenstein monster” aggregated from the various characters Austero has played, the Fifteenth Circuit majority attempted to identify some similarities: “Moonie matches Austero in height, body style, proportions, skin tone, hair color, and hair style. The AI model also wore the same costume as Austero . . . and copied Austero’s tap-dance steps.” R. at 29a (internal citation omitted). But none of these similarities convey Austero’s likeness via “identifying characteristics *unique* to the individual [that] were used in a context in which they were the only information as to the identity of the individual.” *White*, 971 F.2d at 1404 (emphasis added). *Compare Midler v. Ford Motor Co.*, 849 F.2d 460, 463–64 (9th Cir. 1988) (singing voice was the only information identifying the subject of a radio advertisement), and *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983) (catchphrase unique to comedian Johnny Carson was the only identifying information in a manufacturer’s slogan), *with Landham*, 227 F.3d at 625 (toy modeled after the plaintiff’s movie character but with other differing features did not invoke plaintiff’s identity).

The Fifteenth Circuit’s reliance on the series of video game cases is equally inappropriate. *Davis v. Elec. Arts Inc.*, 775 F.3d 1172 (9th Cir. 2015); *Keller v. Elec. Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013). In each case, the defendant had created avatars that portrayed real football players’ exact physical features and other biographical information. *See Davis*, 775 F.3d at 1175–76 (pointing out that unnamed avatars shared “identical physical characteristics” as a corresponding historical player); *Keller*, 724 F.3d at 1271 (“Every

real football player on each team . . . has a corresponding avatar in the game with the player's actual jersey number and *virtually identical* height, weight, build, skin tone, hair color, and home state.”) (emphasis added); *Hart*, 717 F.3d at 166 (“[T]he digital avatar. . . matches Appellant in terms of hair color, hair style and skin tone . . . [and] also accurately track[ing] Appellant’s vital and biographical details.”). Unlike the digital avatars representing players perfectly but for the absence of a name, the digital avatar of Moonie has some physical similarities and many other physical differences with Austero. While the only identifying characteristics of the avatars point necessarily to a real person, Moonie’s features convey far more ambiguity. *Cf. White*, 971 F.2d at 1405 (Alarcon, J. concurring in part) (“[A]n attractive appearance, a graceful pose, blond hair, an evening gown, and jewelry are attributes shared by many women, especially in Southern California. These common attributes are particularly evident among game-show hostesses, models, actresses, singers, and other women in the entertainment field.”) A rule which attaches tort liability to anything other than *uniquely* identifying information would open the floodgates for endless publicity violations, because “it is impossible to evoke a movie or TV show without evoking the identities of its actors to some extent.” *Landham*, 227 F.3d at 626; *see also White*, 989 F.2d at 1515 (Kozinski, J., dissenting from denial of rehearing en banc) (warning of the dangers of overextending the right of publicity).

Analysis of the singing voices of the AI model and Austero also militate against a viable right-of-publicity claim. Compared to *Midler*, in which the plaintiff provided evidence of multiple people stating their belief that the singing voice in the

commercial “sounded exactly’ like” the plaintiff, 849 F.2d at 462, here Austero can muster only a single witness who can only speculate as to the *possibility* of similar voices. R. at 66a. Unlike in *Midler*, where the voice was the only way Midler could be identified, here a plethora of contrary identifying evidence weighs against the sole expert witness, including the fact that Austero sings in a lower octave and that Moonie sings is a different version of “New York, New York” than the one Austero famously performed. R. at 66a. As with the physical similarities, the singing voice at issue provides neither unique information nor specifically identifying information. Austero cannot leverage features which at best approximate an AI character to underpin a right-of-publicity claim.

ii. Austero failed to prove *Moonie Bares All* was likely to cause damage to her commercial persona.

Austero failed to plausibly allege that her commercial opportunities have been harmed by *Moonie Bares All*, thus rendering summary judgment appropriate for failure to state a claim. While the right of publicity was originally intertwined with the right of privacy, courts have since distinguished the personal right to be left alone and the business right to control use of one’s identity in commerce. McCarthy treatise, *supra*, §§ 1.1–1.6; Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Cal. L. Rev. 127, 167–78 (1993). The rationale undergirding right-of-publicity claims is to protect commercial, not emotional interests. *See, e.g., Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (“An entertainer such as petitioner usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication.”);

Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1447 (11th Cir. 1998). The Second Restatement clarifies this point further in comment c.: “Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right.” RESTATEMENT (SECOND) OF TORTS § 652C cmt. c. (1977).

The Fifteenth Circuit did not analyze the third prong of the *Friendfinder* test because petitioners had not challenged it during summary judgment motions. R. at 20a. However, “once a . . . claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments made below.” *Yee v. Escondido*, 503 U.S. 519, 534 (1992). Even though “it is the general rule . . . that a federal appellate court does not consider an issue not passed upon below,” appellate courts are given the discretion to decide when to deviate from this general rule of waiver. *Singleton v. Wulff*, 428 U.S. 106, 120–21 (1976). Deviations are permitted in exceptional cases or when the rule would produce “a plain miscarriage of justice.” *Pinney Dock and Transport Co. v. Penn Cent.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (internal quotations omitted). Reviewing courts should err on the side of addressing novel issues “to the extent the issue is presented with sufficient clarity and completeness and its resolution will materially advance the progress of this already protracted litigation.” *Id.* (citing *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1370–71 (6th Cir. 1977)).

This court should rigorously analyze this issue despite the Fifteenth Circuit’s refusal to do so, because whether Austero has demonstrated commercial harm is clear

and dispositive to the outcome of this dispute. As in *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, this case “is distinguished by the fact that the speech involved is not commercial, but rather speech subject to full First Amendment protection.” 95 F.3d 959, 970 (10th Cir. 1996) (holding that parody trading cards did not appropriate value from Major League Baseball players). The value supposedly diminished by the video is political value, not commercial value. While reasonable inferences are construed for the movant at the summary judgment stage, Austero has not pled plausible facts to enjoy an inference of commercial harm. Austero has been retired from acting and public performances for years. R. at 3a. Her last acting role was in 2009, and her last album was released in 2010. R. at 3a. The movie on which petitioners allegedly based their video was a “financial flop” and “not a well-known movie (much less one commonly associated with Austero),” undermining any claim that petitioners’ video somehow reduced her potential earnings by co-opting potential viewers of Austero’s film. R. at 64a. While Fünke created the AI model in part to benefit from her own technology, R. at 3a, this commercial benefit never belonged to Austero, and “you cannot steal what is legally your property.” *The Office: Café Disco* (NBC television broadcast May 7, 2009); see also *McFarland*, 14 F.3d at 918 (quoting *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1353 (D.N.J. 1981)) (“The ‘right of publicity’ ‘signif[ies] the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of *his* name and picture or likeness and to prevent others from unfairly appropriating this value for commercial benefit.”); see also *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728–29 (S.D.N.Y. 1978)

("[T]he interest which underlies protecting the right of publicity 'is the straightforward one of preventing unjust enrichment by the theft of good will.')" (internal quotations omitted).

Failure to prove that the one's name or likeness retained intrinsic value can defeat right-of-publicity claims. *See, e.g., Reeves v. Fox Television Network*, 983 F. Supp. 703, 710 (N.D. Ohio 1997) (granting summary judgment to defendant under Ohio law because plaintiff's name and likeness had no "intrinsic value"); *Schifano v. Greene County Greyhound Park, Inc.*, 624 So.2d 178, 181 (Ala. 1993) ([“There] is no unique quality or value in the [plaintiffs'] likeness that would result in commercial profit to the [defendant]”). *Cf. Zacchini*, 433 U.S. at 576 n.12 (commenting that in a counterfactual situation in which the value of a performance had increased following the allegedly tortious act, there could be no right-of-publicity claim). Akin to the *Reeves* and *Schifano* plaintiffs, *Austero* has not shown that her commercial persona has any value as a threshold matter, mooting her claims that this value had been appropriated.

Even the Ninth Circuit in *White*, from which the Fifteenth Circuit constructed an expansive right-of-publicity tort, distinguishes commercial contexts from “expressive conduct.” Acknowledging the slippery slope concerns raised by Judge Alarcon’s concurrence, the *White* majority construes its holding narrowly: “This case concerns only the market which exists in our society for the exploitation of celebrity to sell products, and an attempt to take a free ride on a celebrity’s celebrity value.” *White*, 971 F.2d at 1401. To allow plaintiffs to bring right of privacy claims to protect against

vague reputational harms would be to upset “the careful balance that courts have gradually constructed between the right of publicity and the First Amendment.” *Landham*, 227 F.3d at 625. *Cf. Cardtoons*, 95 F.3d at 976 (“We cannot allow those who enjoy the public limelight to so easily avoid the ridicule and criticism that sometimes accompany public prominence.”). Without proving that *Moonie Bares All* hindered her ability to benefit commercially from her likeness, Austero simply has no viable right-of-publicity claim.

B. Even If Austero Has a Viable Right-of-Publicity Claim, *Moonie Bares All* is Protected Under the First Amendment.

As a matter of law, the *Moonie Bares All* video is entitled to summary judgment on its affirmative defenses under the First Amendment. The video at issue falls squarely within the ambit of this country’s long history of Free Speech Clause jurisprudence, which treats with skepticism any attempt to restrict political speech. *E.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Snyder v. Phelps*, 562 U.S. 443 (2011). Even if Austero could have pled a prima facie right-of-publicity claim, FakeBlock and Fünke cannot be liable due to several affirmative defenses under the First Amendment.

1. The video is protected under the public interest defense.

Speech commenting on matters of the public interest enjoy broader immunity from claims of infringement on an individual’s right of publicity. *See, e.g., Michaels v. Internet Ent. Grp., Inc.*, 5 F. Supp. 2d 823, 839 (C.D. Cal. 1998) (“[The] distinction between speech that proposes a commercial transaction, and speech that comments on matters of public interest has been applied regularly to distinguish protected

speech from actionable misuse of a person’s name or likeness[.]”); *Toffoloni v. LFP Publ’g Grp., LLC*, 572 F.3d 1201, 1208 (11th Cir. 2009) (evaluating whether photographs served a legitimate news purpose and thus did not violate right of publicity). While the contours of the Newport Beach common law on the right of publicity are unclear, *see* pages 25–29, *supra*, many states provide a newsworthiness defense or exception to right-of-publicity claims as a matter of state law. *See, e.g.*, Ind. Code § 32-36-1-1 (2020) (exempting from right-of-publicity laws material of “newsworthy value”); *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824, 832 (11th Cir. 2016) (holding that Michigan’s right-of-publicity law does not apply to newsworthy uses); *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 545–46 (Ct. App. 1993) (rejecting a misappropriation of identity claim under California law because the use was newsworthy and a matter “in the public interest”). This affirmative defense “rests on the right of the public to know and the freedom of the press to tell it.” *Hilton v. Hallmark Cards*, 599 F.3d 894, 912 (9th Cir. 2010).

The Fifteenth Circuit improperly discounted the public interest value of petitioners’ speech by intimating that Fünke’s speech did not publish or report “factual data.” R. at 39a. The delineation between factual data and opinion content is unsupported by the authorities they cite. The dispositive issue in *Hilton* on the public interest defense was whether the defendant card company was engaged in “publication or reporting,” not whether the data was factual. Indeed, the *Davis* court noted that the public interest defense can include “a fair *comment* on real life events.” 775 F.3d at 1179 (citing *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 543 (Ct.

App. 1993)) (emphasis added). Other courts have found similar public interest concerns manifest in both commentary and facts: the defense relates to “almost all reporting of recent events,” as well as to publications about “people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities.” *Eastwood v. Superior Ct.*, 149 Cal.App.3d 409, 421 (1983); *see also Brown v. Showtime Networks*, 394 F. Supp. 3d 418, 439 (S.D.N.Y. 2019) (deeming a documentary about Whitney Houston as both “expressive work” and safely within the scope of the public interest defense). As other courts have noted, the optimal “public interest” test should eschew the inevitably slippery line between facts and opinion between commercial works and instead demarcate commercial speech from “expressive works, whether factual or fictional,” which cannot support a right-of-publicity claim. *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002). By way of comparison, this Court has developed a similarly expansive view of the “public interest” in its First Amendment jurisprudence to include matters of social and political importance. *See Connick v. Myers*, 461 U.S. 138, 146 (1983) (noting that speech is of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community[.]”); *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (Speech is of public concern when it “is a subject of general interest . . . to the public.”).

Moonie Bares All is a matter of public interest twice over, because Austero is both a celebrity and a political figure. The model uploaded by Fünke to FakeBlock provided political commentary about Austero’s policy preferences and fitness for office in the

lead up to a contested Senate election in Newport Beach. *Contra* R. at 39a (“*Moonie Bares All* was meant to entertain viewers and inform them about Fünke’s AI-generating software, not to publish facts about Austero.”). Political speech enjoys the “zenith” of First Amendment protection. *See Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (political speech is “at the core” of electoral processes and First Amendment liberties); *cf. Connick*, 461 U.S. at 145 (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection.”). This Court has given a wide berth to trite or even odious political speech due to the significance of the issues implicated. *See Snyder*, 562 U.S. at 454 (“[W]hile these messages may fall short of refined social or political commentary, the issues they highlight . . . are matters of public import.”). Compared to the speech at issue in *Snyder*—insults hurled by protestors at the funeral of a fallen soldier—a de facto attack ad in the lead-up to a federal election falls squarely within the ambit of the First Amendment. The political issues raised by this video are salient to the voters of Newport Beach, and the commentary both “entertain[s] viewers and inform[s] them” about Austero’s campaign. R. at 39a. To determine that opinionated political speech cannot avail itself of the public interest defense contravenes caselaw on both the right-of-publicity tort and the First Amendment.

2. Strict scrutiny is the appropriate standard for protecting First Amendment rights.

For similar reasons, the speech in question here deserves the heightened protection of strict scrutiny analysis compared to the commercial speech at issue in other right-of-publicity cases. State common law may not “restrict expression because

of its message, its ideas, its subject matter, or its content.” *Police Dep’t of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). Content-based restrictions of speech trigger strict scrutiny analysis; they are “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Accordingly, the Ninth Circuit has declined to expand *White* to instances where the right of publicity necessitated a content-based restriction, subjecting the plaintiff’s right-of-publicity claim to strict scrutiny analysis. *Sarver v. Chartier*, 813 F.3d 891, 905–06 (9th Cir. 2016) (identifying California’s common law right of publicity as a “content-based speech restriction” which “cannot stand unless [the plaintiff] can show a compelling state interest in preventing the defendants’ speech”); *see also Pooley v. Nat’l Hole-In-One Ass’n*, 89 F. Supp. 2d 1108, 1113 (D. Ariz. 2000) (distinguishing between “communicative” speech, which “wins over the right of publicity” and “is entitled to the highest level of First Amendment protection,” and “commercial” speech, against which “the right of publicity generally wins”). Rather, *White* and its progeny are cabined to “speech which either appropriates the economic value of a performance or persona or seeks to capitalize off a celebrity’s image in commercial advertisements,” which do not merit heightened scrutiny. *Sarver*, 813 F.3d at 905.

Fünke’s speech unambiguously falls into the former category of political and communicative speech, and invoking tort liability under the right of publicity would be tantamount to a content-based restriction. As the Court noted in *Ashcroft v. American Civil Liberties Union*, “the Constitution demands that content-based

restrictions on speech be presumed invalid . . . and that the [g]overnment bear the burden of showing their constitutionality.” 542 U.S. 656, 660 (2004). To overcome this presumption, the government must demonstrate that any restriction is “narrowly drawn” to further a “compelling interest” and that the restriction amounts to the “least restrictive means” available to further that interest. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). As applied to Fünke and FakeBlock, the Newport Beach right-of-publicity cause of action cannot withstand strict scrutiny. The state’s interest in policing the right-of-publicity is limited to “preserving an economic incentive for [the individual] to make the investment required to produce a performance.” *Zacchini*, 433 U.S. at 573, 576. This interest is neither compelling nor even implicated by noncommercial speech like Ms. Fünke. *See Sarver*, 813 F.3d at 906 (holding that the documentary “The Hurt Locker” was entitled to full First Amendment protection because it was not proposing a commercial transaction). Simply put, Austero’s attempt to exploit Newport Beach common law should fail the heightened scrutiny appropriate for efforts to silence disfavored political speech.

3. In the alternative, the video is protected under the transformative-use test.

In determining whether a work qualifies as a parody and is entitled to First Amendment protection, some courts have weighed five factors under the “transformative use” test implemented in *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001). These factors are:

1. Whether the celebrity likeness is one of the “raw materials” from which an original work is synthesized (and thus is transformative) rather than the

celebrity’s depiction being “the very sum and substance of the work in question”;

2. Whether the work is primarily the defendant’s own expression—where such “expression” amounts to something more than just the celebrity’s likeness. That is, would a likely purchaser’s primary motivation be to buy a reproduction of the celebrity or instead the artist’s expressive work;

3. Whether the literal and imitative elements, or the creative elements, predominate;

4. Whether the economic value of the work derives primarily from the celebrity’s fame; and

5. Whether the artist’s skill and talent are manifestly subordinated to the overall goal of creating a conventional portrait of the celebrity.

Id.

Though this test was first developed by the California Supreme Court in *Comedy III*, other courts have ostensibly applied this analysis, albeit with different results. See Robert Post & Jennifer Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L. J. 86, 129 (2020) (“The exact meaning and method of applying the transformative-work test remains disputed. Courts that claim to apply this analysis do so in different ways.”); compare *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 934–36, 938 (6th Cir. 2003) (finding that a realistic photo of golfer Tiger Woods had been sufficiently transformed), with *Comedy III*, 21 P.3d at 805 (finding that a realistic photo of the Three Stooges had not been transformed). Despite the diversity of approaches to this test, the Fifteenth Circuit’s application of the transformative-use test manages to garner no support in *any* case in the annals of American jurisprudence. The Fifteenth Circuit majority analyzed the video piecemeal, conceding that “the song lyrics sung by Moonie qualify as parody,” but then holding that “the transformative-use test yields a conclusion of infringement as to the parts of *Moonie Bares All* that depict Moonie wearing the same distinctive costume as

Austero, copying Austero’s tap-dancing performance from the Radio City Music Hall, and imitating Austero’s voice.” R. at 35a–36a. Erasing the most transformative element of the video and only thereafter applying the transformative-use test renders the outcome a *fait accompli*. This approach is belied by the text of the transformative-use test, *see Comedy III*, 21 P.3d at 799 (referring to “the work,” the “overall goal” and, collectively, the “elements” of the work), and the precedent of every court who has applied this test. *Contra, e.g., Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003) (clarifying comic books contain significant expressive content and thus were transformative); *Comedy III*, 21 P.3d at 810–11 (evaluating portrait as a whole and finding no transformative elements); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013) (evaluating jointly the context, digital representation, and interactivity in its transformative-use analysis of a video game).

Taken together, *Moonie Bares All* fulfills all five prongs of the test. The *Moonie* character may evoke Austero, but Austero was not literally depicted and had a different name and features. *Cf. Winter*, 69 P.3d at 479 (“Although the fictional characters . . . are less-than-subtle evocations of [plaintiffs], the books do not depict plaintiffs literally. Instead, plaintiffs are merely part of the raw materials from which the comic books were synthesized.”). Fans of Austero’s who sought to support her work would be disappointed if they instead purchased Fünke’s software. *Cf. id.* (“Plaintiffs’ fans who want to purchase pictures of them would find the drawings of the [defendants] unsatisfactory as a substitute for conventional depictions.”). The second and fifth element of the test also favors Fünke and FakeBlock. The Fifteenth

Circuit’s assertion that the Moonie character was not “something more than the defendant’s likeness” ignored the entirety of the song and lyrics that Moonie sang in the video, which the majority acknowledged was clearly transformative R. at 35a–36a. Similarly, the song and lyrics swing the fifth prong in favor of Fünke and FakeBlock, because with the important context, the video transcends a mere “conventional portrait of a celebrity” to an artistic parody with an overtly satirical message. R. at 35a. The Fifteenth Circuit also misconstrued the second aspect of this prong—“[W]ould a likely *purchaser’s primary motivation* be to buy a reproduction of the celebrity or instead the artist’s expressive work”—by transposing the purchaser’s intent with the creator’s incentives. R. at 35a (emphasis added). Though one (and not the primary) motivation was to market Fünke’s software, the factual record fails to show Fünke had any motivation to reproduce Austero’s work. R. at 35a.

The Fifteenth Circuit likewise erred in its analysis of the third and fourth elements. By removing the most creative element from its analysis (the song and lyrics), the Fifteenth Circuit all but ensures that the “imitative elements” predominate over the creative ones. R. at 38a. Even more dubiously, the Fifteenth Circuit assumes without justification that “Fünke was implicitly selling the idea that her software might be used to create a realistic portrayal of celebrities,” thus concluding that “the economic value of *Moonie Bares All* is the software’s capacity to create more celebrity depictions.” R. at 37a–38a. But Fünke stated that she sought to “advertise her software’s capabilities to potential licensees,” R. at 4a, which, as the dissent notes, is not “*celebrities*, but instead, *humans in general*.” R. at 66a (emphasis

original). As a result, the economic value of *Moonie Bares All* does not “derive[] primarily from the celebrity’s fame.” R. at 33a. As the dissent explains, if a future licensee’s work infringes upon Austero’s publicity right or that of another celebrity, the claim should be brought then. R. at 66a.

Taken as a whole, this video is legally indistinguishable from the many parody depictions of singing, dancing, and entertaining politicians on comedy shows like *Saturday Night Live*. *See, e.g., Saturday Night Live: Dwayne Johnson* (NBC television broadcast May 20, 2017) (featuring an actor as President Trump singing a parody version of Leonard Cohen’s “Hallelujah”). To prohibit *Moonie Bares All* from receiving the strong First Amendment protections given to parody speech would threaten the “broad scope” afforded to purveyors of satire and parody. *Winter*, 69 P.3d at 478.

CONCLUSION

For these reasons, this Court must reverse the decision of the Fifteenth Circuit and grant summary judgment in favor of Petitioners FakeBlock and Fünke.

APPENDIX

47 U.S.C. § 230 – Protection for private blocking and screening of offensive material provides, in relevant part:

...

(b) Policy

It is the policy of the United States—

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for “Good Samaritan” blocking and screening of offensive material

- (1) Treatment of publisher or speaker No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
- (2) Civil liability No provider or user of an interactive computer service shall be held liable on account of—
 - (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected;
 - or
 - (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)

...

(e) Effect on other laws

- (1) No effect on criminal law Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

- (2) No effect on intellectual property law Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.
- (3) State law Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.
- (4) No effect on communications privacy law Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.
- (5) No effect on sex trafficking law Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—
- (A) any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;
 - (B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or
 - (C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant’s promotion or facilitation of prostitution was targeted.